

TENDAI KAROTEROTE

Versus

THE STATE

HIGH COURT OF ZIMBABWE

MUZOFA & BACHI-MZAWAZI JJ

CHINHOYI, 29 May 2023 - 15 June 2023

T. H. Maromo, for the State

Accused, Self-Actor

Criminal Appeal

BACHI MZAWAZI J: The appellant was charged and convicted of four counts of robbery in terms of s126 of the Criminal Law [Codification and Reform] Act Chapter 9:23. He pleaded not guilty but was nevertheless convicted after a full trial. He was sentenced to 4 years imprisonment on each count to make a total of 16 years imprisonment, with 4 years suspended for 5 years on stated conditions. He is serving an effective 12 years imprisonment. He is appealing against both conviction and the sentence.

Appellant raised five improperly drafted grounds of appeal. Ordinarily, this court would not have entertained such long, winding and repetitive grounds but, since he is self-actor, justice must be seen to be done. Hence, it is in the interests of justice that the grounds have been salvaged and summarized.

Evidently, the issue of identification is the main ground of appeal. The appellant argued that the identification process was flawed as the identification parade was conducted after the photos of his arrest had gone viral on several social media platforms. He asserts that the police let the police dog loose on him resulting on bites on the face. Hence, it was easy for the complainants then to pick him in a line of several other people as he was the only person with visible injuries reflected on those photos.

His further attacks on the findings of the court *a quo* are that, the court concluded that he was amongst those who fled Mbogo centre and that his cell phone was found amongst the recovered stolen articles. He stated that he was a victim of circumstances who happened to be at the wrong place at the wrong time. He is not known to any of those arrested in connection with this offence.

In his submissions in court, the appellant stated that apart from the challenged identification parade, no evidence was produced to link him to the offence. He vehemently protested that his phone was recovered amongst the stolen goods. His explanation which in our view is reasonable is that upon arrest, as is the procedure, accused person's belongings were taken and recorded by the police. It is during those routines that his phone was taken upon his arrest. He was shocked to see it being bundled two days later as one of the exhibits.

The allegations are that sometime within the period between 5th May 2022 and 2nd June 2022, at Mzari Chinhoyi the appellant who was a member of a gang, some on the run, robbed four people on separate occasions. It is said that they used machetes and axes to subdue their victims and then got away with cash and other personal belongings of the victims. He was arrested, when one of the complainants identified the other accused in the company of the accused at Mbogo Shopping Centre.

It was the court's finding that complainant in count one identified the accused as the person who had approached him to hire a taxi. He was then robbed by the accused's colleagues who had boarded his vehicle. This witness admitted that he identified the appellant clearly only after the arrest. The possibility that this witness's evidence was influenced by the photos flighted in the social media was not eliminated. It remained the appellant's word against that of the witness.

On record, the evidence which was first to be led is that of the fourth complainant who played a double role of both a victim and the investigating officer. He is the one who led to the appellant's arrest. Whilst there is evidence that may link the appellant's co-accused to

the offence, it seems from the record that there is no tangible evidence that linked the appellant to the offence.

It was not refuted, that police dogs were set on, pounced and bit the accused person. It is also evident that photos were taken and publicized of the arrest. It could not be eliminated that evidence of the rest of the complainants that they saw the appellant during the commission of the offences was tailor- made to suit the already arrested and displayed suspects.

The same applies to the identity parade which was from the facts was a mere formality. The witnesses had no prior knowledge of the appellant. The prevailing circumstances characterized by an ambush and robbery in the late hours of the night is likely to have played tricks on the alleged witnesses minds, thus affecting their identification evidence. See, *State-v-Mutter and Anor SC66-89. Makoni & Others v S SC-67-89.*

In *S v Madziwa S-191-90*, it was noted that, weak evidence of identification is not made any more reliable by the mere fact that appellant was in the vicinity at the time and lied about that fact, as even an innocent person can lie out of a sense of panic.

In *Nkomo & Anor 1998 (3) ZLR 117(S)* it was stated that broadly speaking, good identification does not need corroboration or support, but poor identification does.

Disposition

Truly speaking this court cannot turn a blind eye on two glaring features of the identification issues raised. The flighting and wide coverage of the appellant's face on the social media was not rebutted in evidence. Secondly, the people arraigned in the identification parade were not of the same height and only one was visibly facially injured whom from the publicised photos it is the appellant.

Over and above that, the police officer who pounced on the appellant was on a vindictory mission and it is said he led to the arrest of people he accosted in the shop. The appellant's defence that he was caught in a cross fire was probable. More so when the co -

accused who was somehow linked to the offence involving this police officer exonerated him. There was no independent evidence indicating that the two accused knew each other and acted together. Offences of this magnitude attract very harsh imprisonment sentences. We as a court cannot be satisfied that simply because a mock parade of identification was done then it was full proof.

We uphold the appellant's grounds of appeal. We are of the view that the court erred in not according the appellant the benefit of doubt under such circumstances and concluding that the state had proved its case beyond a reasonable doubt. See *R V Difford* 1937 AD. In, *S v Mapfumo and Others* 1983 (1) ZLR 250 (SC) it was held that,

“There is no onus on an accused person to establish his defence. once there is some evidence suggesting a defence the court must consider this defence.” see, *Kapende v S* HH157/02 and *S v Dube* 1977(1) ZLR 221.

The conviction is quashed therefore nothing turns on the sentence.

Accordingly, the court's decision is set and substituted with not guilty and acquitted.

Honourable Mrs. Justice Bachi-Mzawazi

Honourable Mrs. Justice Muzofa – I Agree